

Mao (Migration) [2020] AATA 3840 (15 September 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Yinxuan Mao
CASE NUMBER:	1817410
DIBP REFERENCE(S):	BCC2018/762822
MEMBER:	Wendy Banfield
DATE:	15 September 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 15 September 2020 at 11:35am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – cancellation – incorrect information and bogus document – degree certificate – discretion to cancel visa – no correct details or further information provided, and no appearance at hearing – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 101, 103, 107, 109
Migration Regulations 1994 (Cth), r 2.41

CASE

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 500 (Student) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant submitted a bogus document and had not complied with the requirement under the Act to provide correct information. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. *Background*
4. The applicant is a citizen of China and is currently 24 years old. He came to Australia on 15 October 2017 as the holder of a Subclass 500 Student visa. The Department later investigated the applicant's claims of having completed a Bachelor of Business Administration at San Diego State University. The Department received information that the document provided by the applicant was bogus and he had not completed a degree at that institution.
5. The applicant was scheduled to appear before the Tribunal on 10 August 2020 to give evidence and present arguments, however, at the start of the hearing the applicant indicated he did not want to participate. The Tribunal contacted the applicant's representative after the hearing who advised the applicant had requested a decision be made on the evidence available.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
9. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
10. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

11. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with ss. 101 and 103 of the Act in the following respects: The applicant stated in his Application for a Student Visa form that the highest level of education he had attained was a Bachelor of Business Administration from San Diego State University on 14 July 2017. He also signed his application declaring he had provided complete and correct information. According to Departmental investigations, this information was not correct, and he had not completed the degree qualification as claimed.
12. The Department confirmed the applicant did not complete a Bachelor of Business Administration degree at San Diego State University on 14 July 2017 and a bogus document was provided in support of the Student (subclass 500) visa application. The applicant did not provide any further information or give correct details of his educational qualifications obtained from outside Australia to the Department or the Tribunal. The Tribunal finds incorrect information regarding the applicant's educational qualifications and a bogus document were submitted with the student visa application dated 21 September 2017. For these reasons, the Tribunal finds that there was non-compliance with ss.101 and 103 of the Act by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

13. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
14. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:
 - the correct information
 - the content of the genuine document (if any)

- whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document
- the circumstances in which the non-compliance occurred
- the present circumstances of the visa holder
- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
- any other instances of non-compliance by the visa holder known to the Minister
- the time that has elapsed since the non-compliance
- any breaches of the law since the non-compliance and the seriousness of those breaches
- any contribution made by the holder to the community.

15. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

- the correct information

16. The Department contacted the university where the applicant claimed to have obtained a degree and based on the information received, determined the applicant had provided a bogus document. The applicant claimed to have been unaware of the document being submitted but did not provide evidence to demonstrate the Department's finding was incorrect. It is the responsibility of the applicant to ensure information provided in support of an application is correct. Therefore, the Tribunal finds the correct information is that the applicant did not complete a degree from San Diego State University and a bogus document was provided. This weighs against the applicant in the Tribunal's assessment of whether to exercise the discretion to cancel the visa.

- the content of the genuine document (if any)

17. The Tribunal is not considering the content of any document in this case.

- whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

18. The Tribunal finds the decision to grant a visa to the applicant was based partly on the incorrect information and bogus document. The applicant was applying for a Student visa and used the incorrect information to support his claims of being a genuine student and genuine temporary entrant.

- the circumstances in which the non-compliance occurred

19. The Tribunal does not have the benefit of hearing from the applicant regarding the circumstances in which the non-compliance occurred. While the applicant claimed to have

been unaware of the bogus document, no further information or evidence was received to refute the Department's findings and the applicant declined to take part in a hearing. For these reasons the circumstances in which the non-compliance occurred weigh against the applicant in considering whether the Tribunal should exercise its discretion to cancel the visa.

- the present circumstances of the visa holder
20. The Tribunal is not aware of the applicant's current circumstances as he chose not to attend a scheduled hearing.
- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
21. The Tribunal notes the applicant responded to the Department's s.107 notice and claimed he was not aware of the bogus document having been submitted. He advised he was making inquiries but did not provide any further information. The Tribunal gives little weight in the applicant's favour when considering this criterion.
- any other instances of non-compliance by the visa holder known to the Minister
22. The Tribunal is not aware of any other instances of non-compliance by the applicant.
- the time that has elapsed since the non-compliance
23. The applicant's non-compliance occurred in September 2017. At the time the applicant was studying but his course was due to be completed on 26 October 2018. The Tribunal gives this consideration no weight in favour of the applicant.
- any breaches of the law since the non-compliance and the seriousness of those breaches
24. There is no information before the Tribunal to indicate the applicant has breached any laws since the non-compliance occurred.
- any contribution made by the holder to the community
25. The applicant did not provide any evidence of having made a contribution to the community and therefore, the Tribunal is unable to place any weight in favour of the applicant on this criterion.
26. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
- Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and subject to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention

27. The cancellation of the visa means that the applicant could potentially become an unlawful non-citizen liable for detention and removal from Australia. The applicant would be subject to s.48 of the Migration Act which would limit his options for applying for a visa. In future the applicant would also have to satisfy Public Interest Criterion (PIC) 4013 which may prevent the grant of a visa for up to three years. The applicant did not provide any submissions regarding the mandatory legal consequences, but the Tribunal accepts he will be unable to study or remain in Australia if the visa is cancelled. However, the Tribunal does not consider the legal consequences of cancellation outweigh the other considerations in this matter that weigh against the applicant.
- whether there would be consequential cancellations under s.140
28. The Tribunal does not have any evidence of any consequential cancellations in this case.
- whether any international obligations would be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child
29. The Tribunal has no evidence regarding any international obligations, including family unity and the best interests of the child. At the time of application, the applicant was single without dependents.
- any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members
30. The Tribunal considered the degree of hardship that will be caused as a result of the applicant's visa being cancelled. Cancellation of the applicant's visa would result in him having to depart Australia and it may also impact his ability to travel to another country. The Tribunal accepts there will be some degree of hardship caused by cancellation of the visa and gives this consideration a little weight in the applicant's favour.

31. *Conclusion*

32. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having weighed the evidence and considering all the relevant circumstances as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

33. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Wendy Banfield
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]** or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and

^{*}This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

- (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.